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No. 85-1299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES LAURENT, Youth Supervisor II, et al.,

Petitioners,

vs.

JEFFREY WATTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Seventh Circuit's decision sanctioning the imposition of Eighth Amendment liability in this case offends traditional principles of federalism by impinging upon the wide-ranging deference which should be accorded to state prison officials by the federal courts and improperly authorizes Eighth Amendment recoveries for isolated violent incidents occurring in state prisons.

LIST OF PARTIES

The following is a list of all parties involved in this application for a Writ of Certiorari.

A. PETITIONERS:

1. James Laurent, Youth Supervisor II
2. Geri A. Cejka, Youth Supervisor II
3. Althea Brown, Youth Supervisor II
4. Steven Van Joske, Youth Supervisor II

B. RESPONDENT:

Jeffrey Watts

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 777 F.2d 1258 and is reproduced in the Appendix at App. 1-25. The judgment of the United States District Court for the Northern District of Illinois is not reported and is reproduced in the Appendix at App. 26-44.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 18, 1985. Defendants obtained an extension of time in order to file a petition for rehearing with suggestion for rehearing *in banc*, which was timely filed on October 10, 1985. A cross-petition for rehearing was also filed by plaintiff. Both petitions were denied on November 1, 1985. (App. 64) This petition for a Writ of Certiorari is timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Plaintiff, Jeffrey Watts, a resident at the Illinois Youth Correctional Center at St. Charles, brought a civil rights suit against several employees at the St. Charles facility, including James Laurent, Geri A. Cejka, Barbara Fredrickson, Barry Steele, Althea Brown and Steven Van Joske. Plaintiff sought to recover damages for a hip injury he received in an incident occurring on January 22, 1982. If viewed in the light most favorable to plaintiff, the evidence adduced at trial in this case was as follows.

The Facility

St. Charles is a medium-to-maximum security institution (STEELE Tr. 357) housing in excess of three hundred male juvenile offenders (WATTS Tr. 67; STEELE Tr. 359) ranging in age from 13½ to 20½. (STEELE Tr. 359). These

boys are housed in separate cottages, each cottage holding about 24 boys. (STEELE Tr. 359). Plaintiff estimated that there were between 11-14 cottages and about a hundred staff persons working at St. Charles at the time of this incident (a staff/offender ratio of 1:3). (WATTS Tr. 68).

With respect to the typical behavior of the residents of the St. Charles facility, it was undisputed that "tough talk" and arguments between the students were commonplace. For example, Mr. Laurent testified that "they all talk tough" (Tr. 340) and "all the kids argue" (Tr. 430, 435). When he was asked whether they ever threatened one another, he responded: "Yes, they would talk about they were going to knock each other in the head and stuff like that." (Tr. 345).

Mr. Van Joske also testified that all of the residents got into fights and arguments and emphasized that he could not think of one student at St. Charles who hadn't gotten into a fight or argument. (Tr. 252, 256-57). Where students engaged in improper behavior, if the infraction was minor, they might be sent to their rooms to "cool off" or they might be given a BAT ticket ("behavior action ticket"); if the infraction was major then a disciplinary report would be written and the resident would be removed from the cottage and sent to Roosevelt. (CEJKA Tr. 217). With respect to fights and threats, Mr. Laurent testified "If they don't stop the argument, they either go in their room and cool off or they have to be wrote up and sent out [to Roosevelt]. Anything I couldn't control, I sent them off to Roosevelt." (Tr. 345).

The Plaintiff

Plaintiff Watts was convicted of a crime and was sent to St. Charles on July 21, 1981. He was a resident at St. Charles for about two years. (WATTS Tr. 67). He had no

complaints in general about the staff at the facility; in fact, he stated that he had a good relationship with most of them: "Well, I was, you know—some of them I got along good with, real good and some of them, you know, we had a few difficulties at times, but pretty much very good." *Id.*

He did not explain in great detail his relationship with the other residents at St. Charles, but he did state that on more than a few occasions several of them attempted to recruit him for one of the gangs there. (Tr. 70-72). He said that he refused to become a member of a gang and he was later asked "And after you said no, nobody harmed you?" He responded "Well, I had a couple fights with a few of them, but you know, I guess that was it." (Tr. 116). Plaintiff also testified as to other fights which he had had at St. Charles in the following exchange:

> Q. Now, you knew that you had to be careful—you said that you had to watch your back against Derrick Greaves, is that correct?
> A. Along with other students, yes.
>
> Q. So he wasn't the only student you had to watch your back against?
> A. I didn't hardly trust too many other students because I seen that a lot of students were fighting. I fought a lot of students, you know. You just can't trust everybody.
>
> Q. Because a lot of kids are tough there?
> A. Yes.

Tr. at 127-28.

The Threats

Plaintiff testified that about three weeks prior to January 22nd he was inside Pierce cottage recreation room at about 5:50 or 6:00 p.m. and was playing cards with

Derrick Greaves, Carmello Santiago, Carlos Rivera and Toronto Brooks (Tr. 74-75) when the following exchange took place.

> Well, he [Derrick] got mad and, you know, he had jumped up and said something about, "You cheating," like that, and I told him, "I'm not cheating. You can go back through the books and look." He talked about that he was going to kick my ass if he found out I was cheating, and I told him, "I'm not accepting no ass-whipping by you or anybody else," that I wasn't cheating, and then he stated that I'm lucky that I'm shorty and that one day he is going to excuse that by me being a shorty, that he is going to fight me or whatever.

Tr. at 76.

The second incident also occurred some time prior to January 22nd, but plaintiff was not sure of the date. On this occasion the whole cottage was present because they were lining up to go to breakfast. (Tr. 77). Plaintiff explained:

> Well, anyway, see, we all, you know, everybody wants to be first in line to eat first, I guess, and it happened in the morning on the way to breakfast, and I was in front of the line, so he [Derrick] wanted to be in front, so he got in front of me. So, you know, I was saying, "Like you just can't walk in front of me." So I walked back in front of him. We kept on doing that for a few minutes and then he stated that he runs the line, he goes first and I said, "you don't go first because I got here before you." And then he said that he goes first because this is his cottage, he run this cottage, and I told him, "You might run them, but I'm not going to let you run over me." And then he said again, he stated that, "You're lucky you're a shorty and one day you're going to get yours."

Tr. 78.

The next incident was about a month prior to January 22nd inside Pierce Cottage between 7:00 and 8:00 p.m. and was an argument "over a pool game." Tr. 78-79.

> He [Derrick] had grabbed a ball and tried to cheat me. It was my shot. He thought I didn't see it. He tried to put it inside the pocket and I told him, "I seen what you did. Pull the ball out and put it back on the table."
>
> He got loud and was saying, "I didn't move the ball." I said, "I seen you move the ball. Just put it back." And then he came up in front of me. He said, "I didn't move the ball." I said, "I seen you."
>
> I grabbed the pool ball and put it back in its place where it belonged. He came over to me. He snatched the ball like that and he put it back in the pocket. I grabbed his hand and moved all the balls. I said "Well, that's your game, so let somebody else play. Who is next," like that, and then he came up on me. He said, "I'm going to smash you, punk, you keep on bothering me. You keep on getting on my nerves, I'm going to smash you."
>
> I said, "Hey, you know you cheated, so get up and let the next person play." He was in my face and me and him was exchanging words, and I don't know exactly which words they were, but, you know, we were exchanging words and other students came in between us and pulled us apart and we were sent to our room for room time.

Tr. 79-80.

The final incident also took place "about a month before"* January 22nd outside the old dining room. Tr. 80. Plaintiff explained this incident as follows:

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* The timing of this incident is inconsistent with the weather described. *See also* Tr. 124-27. However, to avoid any credibility issues, defendants relate the issue just as the plaintiff explained it.

> Well, I remember he [Derrick] came to me because, you know, it was nice outside, it was in the afternoon. It was nice and we were like on the grass by the dining room. Everybody was talking and standing around. A few people were playing, wrestling and all that. And I was talking to one of the students from Cleveland Cottage, James Brown. I think that was his name. And Derrick Greaves didn't like James Brown, so he came over there, you know, and he said, you know, "What's up? I heard you all talking about me," and James Brown looked at him and I said, "we're not talking about you," like that. So then him and James Brown, they didn't like each other, so then they got to looking at each other hard and then the people—* * *
>
> Well, then the staff from Cleveland Cottage—that's the cottage that Brown belonged to, called Brown over to the cottage because they seen them arguing and when he went over there Derrick Greaves was saying stuff like, "you're talking about me, punk. I don't like nobody talking about me if you got anything to say about me, say it in my face."
>
> I said, "If I have something to say about you, I'll say it in your face, but we wasn't talking about you." And then he kept on saying stuff like, "Well, let me find you talking about me," and stuff like that and I was steady telling him that I wasn't talking about him and then he like, he was going like this and making faces at me, like that. So I just looked at him and told him, "Go on, get out of my face. It wasn't about you." And he was mumbling words like, "Boy, one day," stuff like that.

Tr. 81. Plaintiff did not recall any other threats by Derrick Greaves to him. *Ibid.* When he was asked whether he was afraid of Derrick Greaves, he said "I wasn't afraid of fighting him, but I knew I had to watch my back against him." Tr. 116.

The Attack

The plaintiff's injury occurred on January 22, 1982, shortly after lunch. Tr. 94-95. It was cold and snowing. All of the students lined up outside to walk back to the cottage. The students requested permission to take a short-cut across a field. Tr. 95-96. Plaintiff described the incident as follows:

> Well, the staff members got the [head] count and me along with other students asked Mrs. Brown and Mr. Steven Van Joske can we run—can we cut across the field and she said yea, so almost a majority—everybody started running. I was running to get back to the cottage, and then the next thing I know, Derrick Greaves came behind me and tackled me with a bear hug and fell on top of me. When he got up, he growled and then he walked away like he had done something big.

Tr. 96-97. Derrick Greaves did not hit plaintiff while he was on the ground; Derrick got right up "and growled," then walked away. Tr. 136. When plaintiff was asked whether Derrick came back to see how he was he responded "I think he came back because he was more scared than I was because he knew he had hurt me." *Ibid.* The defendants' failure to guard plaintiff in order to prevent this attack was the basis for their liability under the Eighth Amendment in this case. It was undisputed that plaintiff never asked defendants for protection from Derrick Greaves. Tr. 129-32.* Throughout his trial, plaintiff contended that the defendants knew that Derrick Greaves posed a physical threat to him, but they failed to take any action. Plaintiff claimed that but for defendants' in-

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* At one point, plaintiff stated "I complained to the counselor, Mr. Ray Young [about Derrick]. * * * It wasn't actually a complaint, but, you know, it was talk." Tr. 111.

action, he would have never been injured on January 22nd. Liability was predicated solely upon the fact that plaintiff testified that various staff members were present during one or more of the threatening incidents he described above, so they should have taken steps to prevent an attack upon him by Derrick Greaves.

The Injury

Plaintiff was then taken to the St. Charles Hospital. From there, he was taken to the Elgin Hospital and then finally to the University of Illinois at Chicago Hospital. There, surgery was performed on his dislocated left hip. Afterwards he was sent back to the St. Charles Hospital. Plaintiff testified he was constantly in pain and had to remain in bed for the majority of the time he was in the hospital. (Tr. 97-104).

Relative to the injuries he sustained, his mother testified that ever since he injured his hip, he was not as active as he normally was, and that she paid $980 in medical bills. (Tr. 145, 162). Plaintiff also called as a medical expert Dr. Sean Hanlon. At the time, Dr. Hanlon was still doing his residency training in orthopedics at the University of Illinois at Chicago Hospital. Dr. Hanlon testified that he treated plaintiff for a left hip fracture. (Tr. 285-86).

The Trial

At the close of plaintiff's case in chief, the defendants moved for a directed verdict. The defendants argued that there was no evidence from which the jury could conclude that they had any knowledge of any alleged threats by Derrick Greaves, particularly since plaintiff admitted never telling any of the defendants of these prior incidents and never requesting protection from Derrick Greaves.

Therefore the defendants argued that they could not have been callously indifferent to plaintiff's need for protection because they had no knowledge of these or any prior alleged altercations with Derrick Greaves. (Tr. 66-71, Doc. 47). The District Court granted the motion as to defendant Barbara Fredrickson, but denied it as to the remaining defendants. (C48, Tr. 335-336). At the close of the trial, defendants renewed their motion for directed verdicts; however, the motions were denied. (Tr. 489). On appeal the plaintiff did not question the directed verdict in favor of Ms. Fredrickson.

On February 17, 1984, the jury returned a verdict in favor of the plaintiff and against each of the individual defendants. In each individual verdict form, it assessed compensatory damages of $40,000. (Docs. 57-61). On February 22, 1984, the defendants filed their post-trial motion requesting a judgment notwithstanding the verdict (JNOV), or in the alternative a new trial. (Doc. 64a).

Subsequently, on February 27, 1984, the defendants filed a motion to clarify the judgment. They maintained that the $40,000 in compensatory damages was the total award of plaintiff's injury verdict. (Doc. 64b). On March 12, 1984, the plaintiff filed his response to the above motions. On July 3, 1984, the District Court, in a Memorandum Opinion, granted a JNOV for defendant Barry Steele, denied it as to the remaining defendants, and also granted the defendants' motion to clarify the judgment and held that the defendants Brown, Cejka, Laurent and Van Joske were together liable to plaintiff for no more than $40,000. (Doc. 77).

On July 20, 1984, plaintiff filed his notice of appeal and the defendants filed their cross-appeal on August 1, 1984. (Docs. 79, 81). Thereafter, on August 24, 1984, plaintiff

filed in the Court of Appeals a "Motion for Extension of Time to File Plaintiff-Appellant's Brief and Appendix and to Supplement Record." In this motion, he sought to supplement the District Court record with two juror affidavits.

On August 28, 1984, that Court ordered: "Appellant shall file a separate motion to supplement the record indicating the nature of the affidavits and whether they comply with Federal Rule of Appellate Procedure 10." On September 28, 1984, plaintiff filed a "Motion to Supplement The Record For Appeal" in the Northern District of Illinois. The District Court denied this motion and explained that under Fed. R. App. P. 10, this motion should be brought before the Seventh Circuit Court of Appeals, because:

> Plaintiff never offered the affidavits for the district court's consideration. He neglected to add them in response to defendants' motion to clarify the verdict. Therefore, appending them to the record now adds nothing to the accuracy or completeness of the record. In support of his version of the jury verdict, plaintiff is trying to add new evidence that the district court never had the opportunity to review.

(Doc. 93).

On November 15, 1984, the plaintiff filed his motion to supplement the record on appeal with the Seventh Circuit Court of Appeals. This motion was taken with the case.

The Appeal

The Seventh Circuit Court of Appeals affirmed the jury verdict against defendants Laurent, Cejka, Brown, and Van Joske, because these defendants were present dur-

ing one or more of the threats described above, and because, * * *

> The plaintiff was apparently a credible witness, whose testimony if believed established that each of the defendants was an eyewitness on at least one occasion to an explicit threat made against Watts by Greaves. Moreover, the evidence taken in a light most favorable to plaintiff established that in evaluating the potential seriousness of that threat each defendant was armed with the knowledge that Greaves was physically much larger than Watts, and that the two lived in the same cottage. Various testimony supported the inference that gang activity permeated the Youth Center and that Greaves was a gang leader while Watts resisted joining any gang. The defendants were directly responsible for observing and supervising residents' behavior, and they were in almost daily contact with both Watts and Greaves. Under these circumstances we agree with the trial court that the evidence was sufficient to demonstrate that defendants Laurent, Cejka, Brown and Van Joske knew there was a strong likelihood of an assault, and therefore the court did not err in refusing to grant a judgment notwithstanding the verdict.

Slip Op. at 7-8, App. 7-8.

With respect to plaintiff's appeal from the JNOV granted to defendant Steele, the Seventh Circuit affirmed this result as well because Steele was not present during any of the above threats, nor was there any evidence that he had reason to know of Greaves' animosity towards plaintiff. As that court explained,

> Without such evidence, we cannot see what might have prompted Steele to inquire further into the situation. Surely Steele was not responsible for segregating every gang bully with a history of misbehavior from every smaller non-gang member resident. In short, the jury could not infer from this evi-

> dence that Steele had knowledge of the risk. Thus the court properly granted the judgment notwithstanding the verdict as to defendant Steele.

Slip Op. at 10, App. 10.

On October 10, 1985, the State defendants filed a petition for rehearing with a suggestion for rehearing *in banc*. In their petition for rehearing, the defendants argued that, as a matter of law, liability was improperly imposed under the Eighth Amendment because even assuming that defendants were aware of all of the incidents which plaintiff described, they were still not deliberately indifferent to his need for protection. This petition was denied on November 1, 1985.

REASONS FOR ALLOWING THE WRIT

THE SEVENTH CIRCUIT'S DECISION SANCTIONING THE IMPOSITION OF EIGHTH AMENDMENT LIABILITY IN THIS CASE OFFENDS TRADITIONAL PRINCIPLES OF FEDERALISM BY IMPINGING UPON THE WIDE-RANGING DEFERENCE WHICH IS TO BE ACCORDED TO STATE PRISON OFFICIALS BY THE FEDERAL COURTS AND IMPROPERLY AUTHORIZES EIGHTH AMENDMENT RECOVERIES FOR ISOLATED VIOLENT INCIDENTS OCCURRING IN STATE PRISONS.

Personal security, like medical care, is one of life's necessities to which inmates are entitled in "minimal civilized measure." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Accordingly, the Eighth Amendment protects all prison inmates from cruel and unusual punishment, *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1967), including punishment inflicted in the form of attacks by fellow inmates, provid-

ing prisoners with a federally-protected right to be reasonably free from such attacks. *Miller v. Solem*, 728 F.2d 1020, 1024 (8th Cir.), *cert. den.*, 105 S. Ct. 145 (1984); *Branchcomb v. Brewer*, 669 F.2d 1297, 1298 (8th Cir. 1982); *Clark v. Taylor*, 710 F.2d 4, 9 (1st Cir. 1983); *Little v. Walker*, 552 F.2d 193 (7th Cir. 1977), *cert. den.*, 435 U.S. 932 (1978). Thus, prison officials have a duty to take steps to control violence and protect inmates from physical abuse by other inmates, *Ramos v. Lamm*, 639 F.2d 559, 572 (10th Cir. 1980), and they can be held liable both for their affirmative actions inflicting physical abuse on inmates, and for their "failure to act, when there is a duty to act, to prevent such [violence by other inmates]." *Clark v. Taylor, supra*, 710 F.2d at 9 (*citing Monroe v. Pape*, 365 U.S. 168, 187 (1961)).

However, in order to sustain Eighth Amendment liability for failure to adequately protect an individual inmate, that inmate must show

> . . . something more than mere inadvertence or negligence. He must show [that] the defendants were deliberately indifferent to his constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.

Branchcomb v. Brewer, supra, 669 F.2d at 1298.

The constitutional mandate against cruel and unusual punishment is "not a warranty of pleasant prison conditions." *Ruiz v. Estelle*, 679 F.2d 1115, 1145 (5th Cir.), *amended in part*, 688 F.2d 266 (5th Cir. 1982), *cert. den.*, 460 U.S. 1042 (1983). Prisons need not be country clubs, or even comfortable. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). Furthermore, prison officials are not the insurers of the safety of their prisoners, *Jones v. United*

States, 534 F.2d 53, 54 (5th Cir.), *cert. den.*, 429 U.S. 978 (1976), so prisoners do not have the right to demand that state institutions be made so safe that they will be free from all assaults by other inmates.

In accordance with the foregoing principles, mere negligence or inadvertence is never sufficient to justify the imposition of liability under the Eighth Amendment. *Estate of Davis v. Johnson*, 745 F.2d 1066, 1070 (7th Cir. 1984); *Patzig v. O'Neal*, 577 F.2d 841, 847-48 (3d Cir. 1978). Rather, the plaintiff must show that prison officials have demonstrated deliberate indifference to his need for protection. *Little v. Walker*, 552 F.2d 193, 197 (7th Cir. 1977), *cert. den.*, 435 U.S. 932 (1978).

In order to find deliberate indifference when a prison official fails to protect a particular prisoner from the risk of an attack by a fellow inmate, there must be a "strong likelihood"—rather than a mere possibility—that violence will occur. *State Bank of St. Charles v. Camic*, 712 F.2d 1140, 1146 (7th Cir. 1983); *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973), *cert. den.*, 414 U.S. 1146 (1974). Thus, before liability will be imposed under the Eighth Amendment, plaintiff must establish that prison officials acted with reckless disregard of his right to be free from violent attacks by his fellow inmates. *Little v. Walker*, *supra*, 552 F.2d at 197-98.

Finally, even where such indifference has been shown, the plaintiff must still show a causal connection between a defendant's deliberate indifference and the injury for which compensation is sought. *Parratt v. Taylor*, 451 U.S. 527 (1981); *McKenna v. County of Nassau*, 538 F. Supp. 737 (E.D.N.Y.), *aff'd*, 714 F.2d 115 (2d Cir. 1982).

Imposition of liability under the Eighth Amendment in the instant case was clearly inappropriate under these

well-settled standards because plaintiff here did not show that defendants had been deliberately indifferent to his need for protection, nor did he establish a causal connection between the incident for which he recovered damages and the actions of the defendants (even assuming that those actions constituted deliberate indifference).

Prison officials cannot be expected to eliminate all violent behavior in the volatile atmosphere of a prison setting. As this Court has often acknowledged, a prison is

> a closely, tightly controlled environment peopled by those who have chosen to violate the criminal law and have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life.

Wolff v. McDonnell, 418 U.S. 539, 561-62 (1974). *See also Hudson v. Palmer*, ____ U.S. ____, 104 S. Ct. 3194, 3200 (1984). In such a volatile atmosphere, it must be presumed that disputes among the inmates occur constantly. Indeed, the undisputed evidence in this case was that the verbal disputes plaintiff testified about were commonplace occurrences at the St. Charles facility where he was confined. When such disputes occur between two prisoners, the prison officials must exercise their best judgment with respect to the question of whether future violence is likely to occur as a result of the disputes.

As this Court has also recognized, such exercises of judgment involve "purely subjective evaluations and . . . predictions of future behavior." *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) (*citing Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). Under the decision of the

Seventh Circuit in the instant case, prison officials can be held liable for such an exercise in judgment whenever one prisoner is later injured by another prisoner with whom he had prior verbal disputes which were overheard by prison officials. In effect, this decision makes the State prison officials the insurers of all the prisoners in their care, a result which is patently improper, and which will unquestionably hamper prison officials in the future when they must consider the appropriate action to be taken under similar circumstances.

In *Fleishour v. United States*, 244 F. Supp. 762 (N.D. Ill. 1965), *aff'd*, 365 F.2d 126 (7th Cir.), *cert. den.*, 385 U.S. 987 (1966), Judge Will stressed that

> * * * all aspects of prison life which seek to encourage rehabilitation and responsible conduct by prisoners inevitably involve calculated risks. Most of those incarcerated have greater or lesser assaultive tendencies and the only certain way to insure against prison episodes is by complete isolation which is not only physically very difficult, if not impossible, but also least likely to induce positive attitudes in and the rehabilitation of persons so treated.
>
> Accordingly, it is, . . . standard practice in modern penal institutions to take calculated risks in various aspects of prison life, housing, work, recreation, religious worship and others, so that prisoners may learn to get along with other persons as part of the rehabilitation process. * * *

Id. at 767.

Rehabilitation and socialization are appropriate goals in any prison setting, particularly in a facility where juvenile offenders are housed, such as the one involved in the instant case. If prison officials are faced with the threat of large monetary judgments against them when they take no action to separate prisoners who have had several verbal

arguments which later might result in a fight, those officials will not be able to honestly exercise their best judgment to achieve rehabilitation goals. Rather, they will be forced to take as many preventative measures as are available (including segregation), to minimize the risk of such judgments. This is the unfortunate, but inevitable, result if the opinion of the Seventh Circuit in this case is not reversed. It is a result which impedes proper administration and maintenance by the states of their penal systems—an area historically within the domain and control of those sovereign entities. *See Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974); *Battle v. Anderson*, 564 F.2d 388, 391-92 (10th Cir. 1977).

State officials should be free to exercise their best judgment with respect to the question of whether arguments over a card game or pool game, or comments such as "You're lucky you're a shorty and one day you're going to get yours" can be safely disregarded as typical "tough talk" between two prison inmates. Thus, intervention by the federal courts was inappropriate under the facts presented by this case, and the Seventh Circuit's opinion imposing Eighth Amendment liability on defendants here sanctions interference with the day-to-day operations of the State's prison system.

It is unfortunate that plaintiff in the instant case was injured, but he was subjected to no more risk that the calculated risk which is inherent in any prison setting, so he has not shown the requisite deliberate indifference justifying the imposition of Eighth Amendment liability. The decision of the Seventh Circuit in this case, while initially acknowledging the deliberate indifference standard, proceeds to affirm a judgment against the State defendants on facts which evidence no intentional or reckless conduct whatsoever on the defendants' part. Thus,

in essence this decision conflicts with decisions in other circuits where courts have refused to impose liability under such circumstances. *See*, e.g., *Jones v. Diamond*, 594 F.2d 997, 1016 (5th Cir. 1979); *Hite v. Leeke*, 564 F.2d 670 (4th Cir. 1977); *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1081 (3d Cir. 1976); *O'Neal v. Evans*, 496 F. Supp. 867 (S.D. Ga. 1980). Other courts have refused to impose liability for an "isolated" attack by a fellow prisoner, even where the plaintiff has shown that prior threats were made by the inmate who attacked him, that the prisoner asked for protection, and that prison officials still failed to prevent the assault. *See Williams v. Field*, 416 F.2d 483, 484 (9th Cir. 1969); *Schall v. Rowe*, 460 F. Supp. 155, 157-58 (S.D. Ill. 1978); *Penn v. Oliver*, 351 F. Supp. 1292, 1294 (E.D. Va. 1972). The Seventh Circuit should likewise have refused to sanction the imposition of Eighth Amendment liability based upon the facts of the instant case, particularly where it was undisputed that plaintiff never asked for protection from Derrick Greaves.

Indeed, the decision of the Seventh Circuit in the instant case conflicts with its own later decision in *Duckworth v. Franzen*, Nos. 85-1010, 85-1053, 85-1084, 85-1095, Dec. 17, 1985, App. 45-63, where the Court reversed a jury award of $561,000 in damages against State officials and held that the defendants' motion for a JNOV on the Eighth Amendment claim was improperly denied. Slip Op. at 16, App. at 60. In *Duckworth* the Court emphasized, with respect to Eighth Amendment claims, that

> [i]f the word "punishment" in cases of prisoner mistreatment is to retain a link with normal usage, the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense. Gross negligence is not enough * * *

> * * * Punishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it. * * *

Slip Op. at 10, 11; App. at 54, 55.

Under the above definition, Eighth Amendment liability could not have been imposed in the instant case. Defendants had no "actual knowledge of impending harm" to the plaintiff here. Moreover, a serious question must be raised concerning the appropriate action which should have been taken in this case, and which should be taken by State prison officials in the future to prevent such incidents from occurring. While there was evidence in this case that Derrick was a "bully," and a gang member, there was no evidence that he physically attacked anyone prior to the incident involved in this case. Prison officials should not be required to segregate every aggressive prisoner who has several arguments with other prisoners to avoid liability under the Eighth Amendment. Indeed, this requirement would place an impossible burden on these officials in light of the numerous aggressive prisoners confined in the State system and the limited resources available to deal with these individuals.

Moreover, even assuming *arguendo* that plaintiff in this case had shown that defendants were guilty of deliberate indifference to his need for protection when they failed to take action to protect him from Derrick, he nevertheless failed to show any direct connection between the defendants' failure to respond to four earlier threatening incidents and his injury, an assault occurring without prior notice some three to four weeks after the earlier arguments. Defendants did not know (and had no reason to know) that Derrick would act against the plaintiff when

he did. Furthermore, the attack itself was without any prior warning. All of the students were running across the field and Derrick tackled plaintiff and fell on top of him. Derrick immediately jumped up and left, so there was nothing which could have been done at the time to prevent the injury to plaintiff. Thus, it is plain that the defendants' motion for a directed verdict or their motion for a judgment notwithstanding the verdict should have been granted in this case.

The Eighth Amendment does not justify the liability which was imposed here, even assuming that the defendants were aware of each of the prior threats as plaintiff testified to them. At best, plaintiff showed that those officials erroneously failed to perceive that those arguments would result in an attack some three to four weeks later, an error in judgment which should not be actionable under the Eighth Amendment.

In two recent decisions, *Daniels v. Williams*, ____ U.S. ____, 46 CCH Sup. Ct. Bull. 609 (1986); *Davidson v. Cannon*, ____ U.S. ____, 46 CCH Sup. Ct. Bull. 627 (1986), this Court addressed the question of whether prisoners could recover under the Fourteenth Amendment for a negligent act by prison officials and concluded that such recoveries were not authorized. In *Davidson*, as in the instant case, the plaintiff was suing to recover damages because prison officials failed to protect him from an attack by another inmate. Despite the fact that plaintiff had warned the officials of a threat by the other inmate two days before he was attacked, this Court found that the failure of the State officials to protect him from the other prisoner was not actionable under the Fourteenth Amendment:

> Respondents' lack of due care in this case led to serious injury, but that lack of care simply does not approach the sort of abusive government conduct that

> the Due Process Clause was designed to prevent * * * Far from abusing governmental power, or employing it as an instrument of oppression, respondent Cannon mistakenly believed that the situation was not particularly serious, and respondent James simply forgot about the note. The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials.

Id. at 632.

While it is true that *Davidson* did not involve an Eighth Amendment claim, the facts of that case are quite similar to those presented by the instant case. Both cases present the question of whether a prisoner should be permitted to recover damages for injuries he received as a result of being attacked by another inmate when prison officials failed to prevent the attack. Moreover, the facts in *Davidson* showed more culpability on defendants' part because of the warnings that an attack might take place and because of the proximity in time between the threat and the attack.

In contrast to the facts presented in *Davidson*, in the instant case neither plaintiff nor anyone else ever warned prison officials that plaintiff might be attacked by Derrick, nor was there ever any prior physical violence between Derrick and the plaintiff. The incident for which recovery was had in this case was an isolated violent incident which, according to plaintiff's own testimony, occurred three to four weeks subsequent to the threatening remarks presumably overheard by one of more of the defendants. Under these circumstances, the Seventh Circuit's conclusion that "reasonable people could have differed about whether each of the defendants had sufficient knowledge [of these threats] that a 'strong likelihood' of an attack existed," Slip Op. at 7, App. 7, was erroneous as a matter

of law because the defendants' conduct here did not evidence "deliberate indifference." A negligent failure to guard one prisoner to prevent an attack by another prisoner is not actionable under the Constitution. Thus, even if defendants overheard each of the threats as plaintiff described them, their failure to act to prevent the attack in this case cannot be said to have crossed over the "abundantly clear" distinction between negligence and intent. *Daniels v. Williams, supra,* at 616. Therefore, the Seventh Circuit's affirmance of Eighth Amendment liability in this case is inconsistent with the holding in *Davidson* that such a failure to guard does not state a constitutional violation and the Seventh Circuit's decision in this case must be reversed.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari. Alternatively, petitioners pray that this Court either summarily reverse the decision of the Seventh Circuit Court of Appeals imposing Eighth Amendment liability on these defendants, or remand this case for recon-

sideration in light of your recent decisions in *Daniels* and *Davidson*.

Respectfully submitted,

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